A

ANEKA MELOR SDN BHD v. SERI SABCO (M) SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
HAMID SULTAN ABU BACKER JCA
B BADARIAH SAHAMID JCA
[CIVIL APPEALS NO: W-02-1480-09-2014 & W-02-1481-09-2014]
27 NOVEMBER 2015

C ***CONTRACT:*** *Building contract – Payment – Progress claims for works done – Subcontract – Main contractor to pay subcontractor after payments released by paymaster – Paymaster released payments but main contractor failed to make payments to subcontractor – Subcontractor filed claim ten years after accrual of cause of action – Whether action was statute-barred – Whether subcontractor entitled to receive progress claims – Limitation Act 1953, s. 6(1)*

D ***EVIDENCE:*** *Documentary evidence – Contract – Claim for payment under subcontract – Progress claims for works done by subcontractor against main contractor – Whether relevant documents adduced to support progress claims – Burden of proving items of progress claim*

E ***LIMITATION:*** *Contract – Accrual of cause of action – Breach of contract – Progress claims for works done – Claim for payment under subcontract – Whether action was statute-barred – Limitation Act 1953, s. 6(1)*

Jabatan Kerja Raya ('JKR') had appointed the appellant ('the first defendant') as the main contractor for a project to resume and complete abandoned works F for the construction of Masjid Seksyen 19, Shah Alam ('the project'). The first defendant's director ('the second defendant') appointed the respondent ('the plaintiff') as the subcontractor and the latter commenced works on 22 March 2004. The plaintiff submitted progress claims in the sum of RM857,053.45 ('the progress claims') and a retention sum of RM45,108.08 G ('the retention sum'), on 30 April 2004 and 17 May 2004, respectively. The second defendant allegedly assured the plaintiff that progress claims would be paid upon the first defendant's receipt of payment from JKR. JKR had released payments but the first defendant did not make payment for any progress claims to the plaintiff. The plaintiff issued a notice of demand to the first defendant but the defendants refused to pay. This prompted the plaintiff H to file a claim for the progress claims and the retention sum at the High Court. In defence, the first defendant submitted that (i) there was a delay in filing the statement of claims; (ii) the action was statute-barred; and (iii) the plaintiff was not entitled to receive the progress claims. The Judicial Commissioner ('the JC') held that (i) since the plaintiff issued a notice of I demand to the first and second defendants on 31 May 2004, the action was

not statute-barred as it was filed on 20 May 2010; and (ii) the plaintiff failed to prove the items of the progress claims and the retention sum. However, the JC awarded a sum of RM200,000 pursuant to s. 71 of the Contracts Act 1950. Hence, the present appeals. In the first appeal, the defendants appealed against the decision of the JC in allowing the plaintiff's claim against the first defendant in the sum of RM200,000 and costs. In the second appeal, the plaintiff appealed against part of the JC's decision, namely against (i) the quantum of RM200,000 awarded; and (ii) the dismissal of the claim against the second and third defendants.

Held (allowing first appeal and dismissing second appeal)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The plaintiff's claims against the first defendant was based on contract, which must be filed in court within the period of six years from the date of the accrual of the cause of action, as provided under s. 6(1) of the Limitation Act 1953. The plaintiff's cause of action for breach of contract occurred on 17 May 2004. The first defendant was under a positive obligation to pay the plaintiff and failure to do so would trigger a cause of action by the plaintiff and the statute of limitation would begin to run on that date. Since the writ of summons was filed on 20 May 2010, the plaintiff's action was statute-barred. (paras 14 & 21)

(2) The burden of proving each and every item of the progress claims laid squarely on the plaintiff. The first defendant had received payments and benefits from JKR relying upon the plaintiff's progress claims. When JKR evaluated the claims submitted by the first defendant and issued the certificate, it showed that the plaintiff had executed works for which he was entitled to claim from the first defendant. The plaintiff's reliance on JKR was misplaced. There was no contractual agreement between the plaintiff and JKR. Considering that the plaintiff was claiming such a huge amount of money in the progress claims, it was incumbent on the plaintiff to adduce bills, receipts or documents in support of the progress claims. (paras 29, 33 & 34)

(3) The plaintiff contended that from the outset, the second and third defendants knew that the first defendant would not pay the plaintiff when they invited the plaintiff to commence work at the site. There was no sufficient evidence to establish that the second and third defendants carried out business with intent to defraud or for fraudulent purpose. A mere failure to fulfil contractual obligation could not support a claim in fraud. (paras 44 & 46)

(4) The plaintiff submitted that it had executed work for the first defendant and since the defendant had enjoyed the benefit of plaintiff's act, the plaintiff was entitled to claim from the first defendant on *quantum meruit* basis. The plaintiff's claim for *quantum meruit* would not succeed since

there was an existing contract between the parties. If there was a valid and enforceable agreement governing a claimant's right to payment, there was neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration. (paras 51 & 54)

Bahasa Malaysia *Headnotes*

Jabatan Kerja Raya telah melantik perayu ('defendan pertama') sebagai kontraktor utama bagi satu projek menyambung semula dan menyiapkan kerja-kerja pembinaan Masjid Seksyen 19, Shah Alam yang terbengkalai ('projek'). Pengarah defendan pertama ('defendan kedua') melantik responden ('plaintif') sebagai subkontraktor and plaintif memulakan kerja pada 22 Mac 2004. Plaintif mengemukakan tuntutan ikut kerja berjumlah RM857,053.45 ('tuntutan ikut kerja') dan jumlah wang tahanan sebanyak RM45,108.08 ('jumlah wang tahanan'), masing-masing pada 30 April 2004 dan 17 Mei 2004. Defendan kedua dikatakan memberi jaminan kepada plaintif bahawa tuntutan ikut kerja akan dibayar apabila defendan pertama menerima bayaran daripada JKR. JKR telah melunaskan bayaran tetapi defendan pertama tidak menjelaskan bayaran tuntutan ikut kerja kepada plaintif. Plaintif mengemukakan notis tuntutan kepada defendan pertama tetapi defendan-defendan enggan membayar. Ini menyebabkan plaintif memfailkan tuntutan bagi tuntutan ikut kerja dan jumlah wang tahanan di Mahkamah Tinggi. Dalam pembelaannya, defendan pertama menghujahkan bahawa (i) berlaku kelewatan dalam pemfailan pernyataan tuntutan; (ii) tindakan terhalang oleh statut; dan (iii) plaintif tidak berhak menerima tuntutan ikut kerja. Pesuruhjaya Kehakiman ('PK') memutuskan bahawa (i) oleh sebab plaintif mengemukakan notis tuntutan kepada defendan pertama dan kedua pada 31 Mei 2004, tindakan tidak terhalang oleh statut kerana difailkan pada 20 Mei 2010; dan (ii) plaintif gagal membuktikan item-item dalam tuntutan ikut kerja dan jumlah wang tahanan. Walau bagaimanapun, PK mengawardkan RM200,000 di bawah s. 71 Akta Kontrak 1950. Oleh itu, timbul rayuan-rayuan ini. Dalam rayuan pertama, defendan-defendan merayu terhadap keputusan PK yang membenarkan tuntutan plaintif terhadap defendan pertama berjumlah RM200,000 dengan kos. Dalam rayuan kedua, plaintif merayu terhadap sebahagian penghakiman PK iaitu terhadap (i) kuantum RM200,000 yang diawardkan; dan (ii) penolakan tuntutan terhadap defendan kedua dan ketiga.

Diputuskan (membenarkan rayuan pertama dan menolak rayuan kedua) Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Tuntutan plaintif terhadap defendan pertama berasaskan kontrak, yang mesti difailkan di mahkamah dalam tempoh enam tahun dari tarikh terakru kausa tindakan, seperti yang diperuntukkan di bawah s. 6(1) Akta. Kausa tindakan plaintif bagi pelanggaran kontrak terakru pada

17 Mei 2004. Defendan pertama berkewajipan membayar plaintif dan kegagalan berbuat demikian akan membangkitkan kausa tindakan plaintif dan kekangan statut bermula pada tarikh itu. Oleh sebab writ saman difailkan pada 20 Mei 2010, tindakan plaintif terhalang oleh statut.

(2) Beban membuktikan setiap satu item dalam tuntutan ikut kerja terletak sepenuhnya pada plaintif. Defendan pertama telah menerima bayaran dan manfaat daripada JKR, berdasarkan tuntutan ikut kerja plaintif. Apabila JKR menilai tuntutan yang dikemukakan oleh defendan pertama dan mengeluarkan sijil, ini menunjukkan plaintif telah melaksanakan kerja-kerja yang ia berhak tuntut daripada defendan pertama. Pergantungan plaintif pada JKR adalah khilaf. Tiada perjanjian bersifat kontraktual antara plaintif dan JKR. Memandangkan plaintif menuntut jumlah wang yang besar dalam tuntutan ikut kerja, plaintif wajib mengemukakan semua bil, resit atau dokumen bagi menyokong tuntutan ikut kerja.

(3) Plaintif menghujahkan defendan kedua dan ketiga tahu sejak dari awal lagi bahawa defendan pertama tidak akan membayar plaintif apabila ia menawarkan plaintif memulakan kerja di tapak. Tiada keterangan yang cukup untuk membuktikan defendan kedua dan ketiga menjalankan perniagaan dengan niat atau tujuan menipu. Kegagalan memenuhi kewajipan kontraktual sahaja tidak menyokong dakwaan penipuan.

(4) Plaintif menghujahkan telah melaksanakan kerja untuk defendan pertama dan oleh sebab defendan pertama telah menikmati tindakan plaintif, plaintif berhak menuntut daripada defendan pertama atas dasar *quantum meruit*. Tuntutan plaintif bagi *quantum meruit* tidak akan berjaya kerana wujud kontrak antara kedua-dua pihak. Jika wujud perjanjian sah dan boleh dikuatkuasakan yang mengawal hak pihak yang menuntut terhadap bayaran, tiada sebab mahu pun alasan perundangan yang mewajarkan pengenaan sebarang obligasi atau janji untuk membayar ganjaran yang munasabah.

Case(s) referred to:

Board of Trade v. Cayzer, Irvine and Co Limited [1927] AC 610 ***(refd)***
Kepong Prospecting Ltd v. Schmidt [1962] 1 LNS 68 HC ***(refd)***
Morphitis v. Bernasconi [2003] Ch 552 ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
New South Wales in Trimis v. Mina [2000] 2 TCLR 364 ***(refd)***
RB Policies At Lloyd's v. Butler [1950] 1 KB 76 ***(refd)***
Re B [2008] UKHL 35 ***(refd)***
Re Banco Nacional de Cuba [2001] 1 WLR 2039 ***(refd)***
Read v. Brown [1888] 22 QBD 128 ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 SC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Siow Yoon Keong v. H.Rosen Engineering B V [2003] 4 CLJ 68 CA ***(refd)***

Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300 SC ***(refd)***
Syed Mohamed Syed Alwi & Ors v. Shariffah Badariah Alwi Al-Attas & Ors And Other Cases [2009] 1 LNS 1234 HC ***(refd)***
Tang Eng Iron Works Co Ltd v. Ting Ling Kiew & Anor [1990] 1 CLJ 1239; [1990] 3 CLJ (Rep) 211 HC ***(refd)***
Tang Yoke Kheng v. Lek Benedict [2005] 3 SLR (R) 263 ***(refd)***
UN Pandey v. Hotel Marco Polo Pte Ltd [1978] 1 LNS 223 HC ***(refd)***
Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 304(1)
Contracts Act 1950, s. 71
Evidence Act 1950, ss. 101, 102
Limitation Act 1953, s. 6(1)(a)

Insolvency Act [UK], s. 213(1)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, para 605, p 266

(Civil Appeal No: W-02-1480-09-2014)
For the appellant - Tabian Tahir (Hashim Ibrahim with him); M/s Arman-Yunos
For the respondent - Ho Hon Keong; M/s Ho & Ho

(Civil Appeal No: W-02-1481-09-2014)
For the appellant - Ho Hon Keong; M/s Ho & Ho
For the respondent - Tabian Tahir (Hashim Ibrahim with him); M/s Arman-Yunos

[Appeals from High Court, Kuala Lumpur; Civil Suit No: S-22-465-2010]

Reported by Najib Tamby

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] There were two appeals before us arising from the same suit. They were:

(i) Civil Appeal No. W-02-1480-09-2012 ("the first appeal"); and

(ii) Civil Appeal No. W-02-1481-09-2014 ("the second appeal").

[2] In the first appeal, the defendants appealed against the decision of the learned Judicial Commissioner ("JC") dated 21 July 2014 allowing the plaintiff's claim against the first defendant in the sum of RM200,000 and costs.

[3] In the second appeal, the plaintiff appealed against part of the judgment of the learned JC as follows:

(i) against the quantum of RM200,000 awarded, interest on the said sum and costs of RM5,000; and

(ii) against the dismissal of the claim against the second and third defendants.

[4] For convenience, we will refer to the respondent as the plaintiff and the appellant as the first defendant, which was what they were in the court below.

The Background Facts

[5] The facts essential to this appeal were simple and straightforward and can be summarised as follows:

(a) The first defendant was the main contractor appointed by Jabatan Kerja Raya ("JKR") for the project known as "Projek menyambung semula dan menyiapkan kerja terbengkalai di tapak Masjid Seksyen 19, Shah Alam untuk Jabatan Kerja Raya, Selangor Darul Ehsan" ("the project").

(b) The second defendant, the director of the first defendant, agreed to appoint the plaintiff as the sub-contractor for the first defendant for the execution of part of the project.

(c) The plaintiff had issued a letter of offer dated 18 March 2014 and that offer was accepted by the first defendant.

(d) The plaintiff took possession of the site and commenced works at the project's site on 22 March 2004.

(e) The plaintiff had submitted the progress claims No. 1 and No. 2, both dated 30 April 2004 and 17 May 2004 respectively, for the amount of RM857,053.45 and a retention sum of RM45,108.08.

(f) It was alleged that the second defendant had assured the plaintiff that the progress claims would be paid upon the first defendant's receipt of payment from the paymaster, JKR. JKR had released payments of RM1,019,638.83 on or about 25 May 2004 and RM918,776.12 on or about 25 June 2004.

(g) In spite of the assurance given by the second defendant, no payment for any progress claims was made by the first defendant to the plaintiff.

(h) In June 2004, the first respondent had evicted the plaintiff's workers from the site of the project.

(i) The first defendant had failed to make payment to the plaintiff and the plaintiff then instructed its solicitors to issue a notice of demand to the first defendant. The defendant still refused to pay or responded to the letter of demand.

(j) The plaintiff's claims against the first defendant were as follows:

(i) the sum of RM857,053.45 being the value of the contract works executed by the plaintiff and a retention sum of RM45,108.08;

(ii) general damages together with interest at the rate of 8% from 30 May 2004 until realisation; or

(iii) in the alternative, the plaintiff is claiming on a *quantum meruit* basis for the value of works executed by the plaintiff for the first defendant; and

(iv) costs.

[6] The crux of the first defendant's defence was as follows:

(a) There was a delay in filing the statement of claims;

(b) The action was statute – barred; and

(c) The plaintiff was not entitled to receive the progress claims amounting to RM857,053.04.

Findings Of The Learned JC

[7] The key findings made by the learned JC were as follows:

(a) with regard to the issue of limitation, the learned JC held that since the plaintiff issued notice of demand to the first and second defendants through letters dated 31 May 2004 and the action was filed on 20 May 2010, the action was not statute-barred; and

(b) with regard to the issue of payment for the works executed by the plaintiff, the learned JC held that the first defendant had received a sum of RM1,019,638.83 from JKR relying on the progress claim submitted by the plaintiff. However, the learned JC went on to hold that the plaintiff had failed to prove each and every items of the progress claim of RM857,053.04 and the amount of retention sum of RM45,108.08. The learned JC, however, awarded a sum of RM200,000 pursuant to s. 71 of the Contracts Act 1950.

The First Appeal

[8] The central issue in the first appeal was whether the learned JC had erred in holding that the plaintiff's action was not statute-barred under s. 6(1) of the Limitation Act 1953 ("Act 254").

JC's Findings

[9] The reasoning of the learned JC in deciding that the action was not statute-barred can be gleaned from the following passages in her grounds of judgment:

Dalam tindakan ini atas keingkaran kontrak oleh defendan-defendan yang dikatakan telah berlaku ke atasnya, plaintif telah memberi notis kepada defendan 1 dan 2 melalui suratnya bertarikh 31.5.04. Writ yang difailkan dan didaftarkan di Mahkamah dalam tindakan ini bertarikh 20.5.10 didapati masih dalam tempoh yang dibenarkan dan tidak melampaui had masa.

Parties' Respective Submissions

[10] The first defendant contended that the course of action first arose on 17 May 2004 when the first defendant failed to pay the second progress claim amounting to RM57,053.45. The writ of summons was filed on 20 May 2004 without the statement of claim being indorsed on the writ. The statement of claim was filed on 10 December 2010 ie, more than six years after the accrual of the cause of action. It was argued, therefore, that the writ and the statement of claim was clearly outside the prescribed period of six years under s. 6(1)(a) of Act 254.

[11] In reply, the plaintiff submitted that the cause of action did not accrue on the date of the progress claims. Clauses (a) and (b) of the terms of the contract, ie, the letter of offer (exh. P1 at pp. 454-578 appeal record) provides:

(a) a certificate for our claim shall be issued 7 days after presentation of our claim which will be rendered to you on 15th of each month;

(b) payment shall be made to us not later than 7 days after certification.

[12] The plaintiff posited the first defendant would be in breach of the contract only after seven days from 18 May 2004 when no certification was made by the first defendant, ie, on 25 May 2004. Thus, the plaintiff's claim was within the limitation period.

Our Findings

[13] Having carefully perused the appeal record and considered the respective submissions of the parties, we were of the opinion that the learned JC fell into serious error with regard to Her Ladyship's finding in respect of the issue of limitation.

[14] With respect, we disagree with the submission of the plaintiff. The plaintiff's claims against the first defendant in the present action was based on contract which must be filed in court within the period of six years from the date of the accrual of the cause of action as provided for under s. 6(1) of Act 254. A 'cause of action' has been defined as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court". (See *Read v. Brown* [1888] 22 QBD 128, 131).

[15] The general rule in contract is the cause of action accrues not when the damage is suffered but when the breach occurred. Consequently, the limitation period runs from the time the contract is breached and not from the time that the resulting damage is sustained by the plaintiff.

[16] In *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, the Federal Court per Gill FJ enunciated on the "date of accrual in the case of debt" as follows:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 509 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
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> In *Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610 617. Viscount Dunedin described "cause of action" as that which makes action possible. **Now, what makes possible an action founded on a contract is its breach.** In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v. Guild* 8 QBD 296 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 74). It would seem clear, therefore, that the expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. (emphasis added).
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> (See also *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1984] 2 MLJ 280; *Insun Development Sdn Bhd v. Azali bin Bakar* [1996] 2 MLJ 188; *The Great Eastern Life Assurance Co. Ltd v. Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209 and *Tenaga Nasional Berhad v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207 (FC)).

[17] Three different reasons have been advanced by the courts to explain the purpose of limitation statutes. The first reason is that a plaintiff with a good cause of action should pursue it with reasonable diligence. The second one is that a defendant might have lost evidence to disprove a stale claim. The third reason is that long dormant claims have more cruelty than justice in them (See *Halsbury's Laws of England*, 4th edn, para 605 at p. 266).

[18] In *R. B. Policies At Lloyd's v. Butler* [1950] 1 KB 76: [1949] 2 All ER 226 (KBD) Streatfeild J. stated that "one of the principles of the Limitation Act 1939 is that those who go to sleep on their claims should not be assisted by the courts in recovering their property. But another equally important principle is that there shall be an end to these matters and that there shall be protection against stale demands".

[19] Further, in *Board of Trade v. Cayzer, Irvine and Co. Limited* [1927] AC 610 Lord Atkinson made the following observation: A

> The whole purpose of this Limitation Act is to apply to persons who have good causes of action which they could if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use. B

[20] To all these, we can add that the policy behind the statute of limitations is to prevent unreasonable delay in the enforcement of legal rights and to protect against the risk of injustice. The rule provides an objective, reliable, predictable and relatively definitive rule that has long governed this aspect of commercial repose of disputes. C

[21] Applying the above principles to the factual matrix of this appeal, we held that the plaintiff's cause of action for breach of contract occurred on 17 May 2004 ie, the date of the second progress claim submitted to the first defendant. The first defendant was under a positive obligation to pay the plaintiff the amount stated in the second progress claim and failure to do so would trigger a cause of action by the plaintiff and the statute of limitation begins to run on that date. Since the writ of summons was filed on 20 May 2004, the plaintiff's action was statute-barred by virtue of being filed after the expiration of the applicable six years limitation period. D E

[22] With regard to the issuance of certificate by the first defendant, we were of the opinion that the plaintiff cannot wait and say that they were waiting for payment certificate to be made by the first defendant before commencing an action against the first defendant. It was undisputed that no payment certificate was ever issued by the first defendant for the progress claim submitted to the first defendant. Does this mean that, until today, time has not begun to run for the purpose of the law on limitation? F

[23] The plaintiff's submission that time begins to run only from the date of the issuance to the plaintiff of the payment certificate by the first defendant was devoid of any substance. G

[24] As a result, the plaintiff's claim should be dismissed as untimely filed.

The Second Appeal

[25] The second appeal is relevant only if we were wrong on the issue of limitation. H

[26] The learned JC held that the plaintiff had failed to prove each and every item of the progress claim of RM857,053.04 and the amount of retention sum of RM45,108.08. The learned JC had this to say at p. 8 of the grounds of judgment: I

A Apakah jumlah ganti rugi yang akan dibayar kepada plaintif jika ada? Sama ada plaintif membuktikan kewujudan wang tahanan berjumlah RM45,108.08 dan sama ada plaintif berhak menerima jumlah wang tersebut? Sama ada plaintif berjaya membuktikan secara ketat bagi setiap dan tiap-tiap satu item tugasan dalam tahun tuntutan bayaran berjumlah RM857,053.04?

B Didapati plaintif gagal untuk membuktikan secara ketat di bawah tajuk ini.

[27] The plaintiff contended that the learned JC failed to consider the fact that the first defendant had received two payments from JKR on the second progress claim submitted by the first defendant relying on the progress claim C submitted by the plaintiff. The first interim payment in the sum of RM1,019,638.83 and the second interim payment in the sum of RM918,776.12 were paid by JKR to the first defendant on 25 May 2004 and 24 June 2004 respectively.

[28] The plaintiff posited that the very fact payment was made by JKR to D the first defendant showed that the works executed by the plaintiff was evaluated and approved by JKR. Therefore, it was argued that the plaintiff shall be entitled to the amount claimed.

[29] With respect, we disagree. The burden of proving each and every item of the progress claim lies squarely on the plaintiff. In *Re B* [2008] UKHL 35, E Lord Hoffmann using a mathematical analogy explaining the burden of proof stated:

> If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which F the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

G

[30] We were of the view that the maxim, "he who avers must prove" and prove he must on a balance of probabilities should be adhered to by the court. (See ss. 101 and 102 of the Evidence Act 1950; *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA; *UN Pandey v. Hotel Marco Polo Pte* H *Ltd* [1978] 1 LNS 223; [1980] 1 MLJ 4; *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300 and *Syed Mohamed Syed Alwi & Ors v. Shariffah Badariah Alwi Al-Attas & Ors And Other Cases* [2009] 1 LNS 1234).

[31] We were mindful that payment claims are usually given and received by parties experienced in the building industry who are familiar with the I particular construction contract, the history of the project and any issues

which may have arisen between them regarding payment. Therefore, one should approach the requirements for a payment claim in a common sense practical manner.

[32] The plaintiff submitted that its progress claim was a construction or building works claim. The progress claim would be submitted based on the percentage of works carried out and done at the site or the material delivered to the site. No invoice, receipts and bills would be attached to the progress claim. The supervising architect/consultant would then visit and inspect the site and conduct a measurement by physical evaluation and verification on each progress claim submitted.

[33] In this instant appeal, the first defendant had received payments and benefits from JKR relying upon the plaintiff's progress claim. So, when JKR evaluated the claims submitted by the first defendant and issued the certificate, it showed that the plaintiff had executed works for which he was entitled to claim from the first defendant.

[34] We were of the view that the plaintiff's reliance on JKR certificate was misplaced. We have carefully examined the letter of offer and we found that there were no provisions relating to certification of the works executed by the plaintiff to be certified by an independent person. Further, there was no contractual agreement between the plaintiff and JKR. Under the doctrine of privity of contract, there was no link between the first defendant and JKR. (See *Kepong Prospecting Ltd v. Schmidt* [1962] 1 LNS 68). Considering that the plaintiff was claiming such a huge amount of money in the progress claim, it was incumbent on the plaintiff to adduce invoices, bills, receipts or document in support of its progress claim.

The Second And Third Defendants' Liabilities On The Debt Of The First Defendant

[35] The plaintiff contended that the second and third defendants as the director of the first defendant had maliciously, wrongly and with intent to commit fraud, threatened and evicted the plaintiff and its workers from the project's site. The plaintiff alleged that the second and third defendants knew and ought to have known that there was a contract between the plaintiff and the first defendant. As a result of the act and/or omission of the second and third defendants, the plaintiff suffered loss and damages as the first defendant refused to fulfil its contractual obligations with the plaintiff. Therefore, the second and third defendants were liable to pay the outstanding sums due from the first defendant to the plaintiff pursuant to s. 304 of the Companies Act.

[36] Section 304(1) of the Companies Act 1965 is in the following terms:

> If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the

A application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[37] Section 304 of the Companies Act 1965 is aimed principally at curbing
B the possibility on the part of the officers of a company to act opportunistically and take advantage of the principle of the separate legal personality of a company and the principle of limited liability. As an exception to these principles, there are circumstances when the law duly acknowledges, and for which it accordingly provides the possibility, in very
C specific situations, for the corporate veil to be pierced. Once the corporate veil has been pierced the creditors of the company whose veil has been pierced may satisfy their claims from the personal assets of the company's shareholders.

[38] Section 304(1) of the Companies Act 1965, can be used when the
D company is in "the course of winding up or in any proceedings against the company". In *Tang Eng Iron Works Co Ltd. v. Ting Ling Kiew & Anor* [1990] 1 CLJ 1239; [1990] 3 CLJ (Rep) 211; [1990] 2 MLJ 440, the court concluded that an application under s. 304(1) is also applicable prior to winding up. In this case, the plaintiff decided to commence an action under
E s. 304(1) when the facts unearthed during an examination of the defendant indicated that there was intention to defraud creditors. Thus, the section is not an insolvency provision but can operate both outside insolvency proceedings and where there are no insolvency proceedings. (See *Re Banco Nacional de Cuba* [2001] 1 WLR 2039).

F **[39]** What is the standard of proof in civil fraud claims? In *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, the court held that the correct standard of proof required for fraud in civil proceedings is "beyond reasonable doubt". The court had this to say:

> … In finding that the plaintiffs had failed to establish fraud on the part
G of the defendant, the learned judge had applied the 'beyond reasonable doubt' standard of proof, following the decision of the Privy Council in *Saminathan v. Pappa* [1980] 1 LNS 174 (PC). Indeed, this was the correct test and standard of proof to use … where fraud (as opposed to forgery) is alleged in civil proceedings, it (the alleged fraud) has to be proved beyond a reasonable doubt. (Per Steven Shim CJSS at page 230).

H **[40]** In our view, the standard of proof in s. 304(1), being a statutory provision, is an exception to the standard required for allegations of fraud in civil cases of common law causes of action in Malaysia. Clearly the Court of Appeal in *Siow Yoon Keong v. H.Rosen Engineering B V* [2003] 4 CLJ 68 made an exception when it held that s. 304(1) only uses the term if "it
I appears" which indicates that a lower degree of proof is required. In construing s. 304(1), the Court of Appeal held that:

> It does not matter whether the section carries both civil and criminal liabilities. It does not matter whether there are other remedies. The question is whether on the facts, the case falls within the ambit of section 304(1) or not and whether this is a fit and proper case for the learned Judicial Commissioner to make the declaration that he did. (at 78a).

[41] In the case of *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584, the Federal Court finally set straight the principles applied in evaluating fraud in civil cases. It was decided by the Federal Court that:

> The correct principles to apply is … where it was stipulated that at law, there are only two standards of proof, namely beyond reasonable doubt for criminal cases and on the balance of probabilities. There is no third standard. Therefore, it is up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim, to find whether the standard of proof was attained. The criminal aspect of the allegation of fraud and the standard of proof required is irrelevant in the deliberation.

[42] It must be noted that other jurisdictions such a Singapore has adopted the standard of balance of probabilities despite the infusion of a criminal element that the more serious the allegation of fraud the higher is the degree of proof, but still not as stringently as required in a criminal case (See *Tang Yoke Kheng v. Lek Benedict* [2005] 3 SLR (R) 263 at 270, 275).

[43] The phrase, "with intent to defraud" is the most problematic element of s. 304(1). The general proposition from the seminal case of *Morphitis v. Bernasconi* [2003] Ch 552 is that for behaviour to fall under s. 213(1) of the English Insolvency Act (which is in *pari materia* with our s. 304 of the Companies Act 1965), there must be dishonesty in the form of incurring company debts by those in charge when either they know that they will not be repaid or there is a substantial and unreasonable risk that they will not be. Indeed, Chadwick LJ accepted counsel for the director's submission that:

> There is a distinction between a fraud on a person that gives rise to a claim in damages against the company and the carrying on of the business of the company with intent to defraud.

[44] In this instant appeal, it was the contention of the plaintiff that from the outset, the second and third defendants, who are both husband and wife and the directors managing the first defendant, knew that the first defendant would not pay the plaintiff when they invited the plaintiff to commerce work at the site. Furthermore, the defendants went to submit their progress claim relying on the plaintiff's progress claim.

[45] The learned JC made a finding of facts that based on the evidence available before her, there was no sufficient evidence to establish that the second and third defendants had acted fraudulently or with intention to defraud the plaintiff.

[46] We agree with the finding of facts by the learned JC. We have scrutinised the evidence on record and found that there was no sufficient evidence to establish that the second and third defendants had carried out the business with intent to defraud creditors or for fraudulent purpose. In our view, a mere failure to fulfil contractual obligation cannot support a claim in fraud. Rather, it is merely a breach of contract claim, which does not by itself constitute a claim in fraud.

[47] There was no cogent and convincing evidence to suggest that the second and third defendants had the intention of not performing their contractual obligations to the plaintiff when they approached and invited the plaintiff to undertake the contract works. In fact, there was a dispute whether the plaintiff was appointed lawfully as the sub-contractor to the project as there was no finality in the terms of the contract.

[48] This was not a case where the company was already in financial difficulties, and in debts, but continued to invite the plaintiff to undertake the contract works despite its directors having knowledge that the company had no reasonable prospect of paying the plaintiff for work done.

[49] We were not prepared to conclude, based on the evidence on the record, that the second and third defendants from the very beginning had decided not to pay the plaintiff when they invited the plaintiff to commence works at the site.

[50] Therefore, this grounds of appeal must fail.

Quantum Meruit

[51] In the alternative, the plaintiff submitted that it had executed the works for the first defendant and the defendant had enjoyed the benefit of the act of the plaintiff. Therefore, the plaintiff was entitled to claim from the first defendant for the said sum on the *quantum meruit* basis.

[52] The learned JC held that the plaintiff was entitled to claim from the first defendant for the sum of RM200,000.

[53] We disagree with the findings of the learned JC. We held that there was a binding contract between the plaintiff and the first defendant. Exhibit P1 (letter of offer) outlined the terms of the contract between the first defendant and the plaintiff, *inter alia*, the contract price for resuming and completing the remaining project work was RM3,031,151.80.

[54] We were of the opinion that the plaintiff's claim for *quantum meruit* would not succeed since there was an existing contract between the parties. In *New South Wales in Trimis v. Mina* [2000] 2 TCLR 364, the general principle was stated by Mason P as follows:

No action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject-matter of the claim. This is not a remnant of the now discarded implied contract theory of restitution. The proposition is not based on the inability to imply a contract, but on the fact that the benefit provided by the plaintiff to the defendant was rendered in the performance of a valid legal duty. Restitution respects the sanctity of the transaction, and the subsisting contractual regime chosen by the parties as the framework for settling disputes. This ensures that the law does not countenance two conflicting sets of legal obligations subsisting concurrently. If there is a valid and enforceable agreement governing the Claimant's right to payment, there is neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration.

Conclusion

[55] In the result, the first defendant's appeal was allowed and the plaintiff's appeal was dismissed. The decision of the learned JC was set aside. We made no order as to costs. The deposit to be refunded.